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From: JLischer@realtors.org [mailto:JLischer@realtors.org]

Sent: Monday, June 05, 2006 2:09 PM

To: ChangeInControl

Cc: Lischer, Jeff

Subject: NAR Comments: Home Depot-ILC Notice

Attached are comments from the National Association of REALTORS(r) and 54 state and local REALTOR(r) Associations on Home Depot's Notice of Change in Control related to EnerBank.

Please let me know if you have any questions.

Jeff Lischer

Manager, Financial Services

Regulatory and Industry Relations

National Association of REALTORS(r)

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jlischer@realtors.org

(See attached file: Home Depot Ltr to FDIC 6-5-06.pdf)



NATIONAL ASSOCIATION
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Thomas M. Stevens, CRB, CRS, GRI
President

June 5, 2006

Mr. John F. Carter
Regional Director
Federal Deposit Insurance Corporation Regional Office
25 Jessie Street at Ecker Square, Suite 2300
San Francisco, CA 94105
[Transmitted by e-mail to changeincontrol@fdic.gov.]

Re: The Home Depot, Inc. Notice of Change in Control

Dear Mr. Carter:

On behalf of the 1.3 million members of the National Association of REALTORS® (NAR), and the Associations of REALTORS® for all 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands, I am writing to express our opposition to the Interagency Notice of Change in Control filed by The Home Depot, Inc. (Home Depot) to acquire 100% of the outstanding shares of EnerBank USA, an industrial loan company (ILC) chartered by the Utah Department of Financial Institutions. EnerBank specializes in making unsecured home improvement loans offered by home improvement contractors.

The National Association of REALTORS®, "The Voice for Real Estate," is America's largest trade association, including NAR's five commercial real estate affiliates. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,500 local associations or boards, and 54 state and territory associations of REALTORS®.

I wrote to Acting Chairman Gruenberg on February 23, 2006, to summarize NAR's concerns about the application of Wal-Mart Stores for federal deposit insurance for its ILC to be chartered by Utah, because its approval would have the effect of eroding the national policy against mixing banking and commerce. On April 11, I testified at the FDIC hearing on Wal-Mart's application to explain our concerns in greater detail. We equally oppose Home Depot's proposed acquisition because its approval would also have the effect of mixing banking and commerce. In particular, Home Depot's proposed business plan is a perfect example of why banking and commerce should not be mixed. Home Depot's plan calls for channeling credit primarily to home improvement contractors that are their customers. This plan will have an anti-competitive effect and adversely affect Home Depot's competitors and other banks.

When banking and commerce mix, the inevitable results are conflicts of interest, harm to the competitive landscape, and risks to the financial system. A bank cannot be an “honest broker” in the provision of financial services if it also competes with its commercial customers and potential customers. Unfair competition results because a bank owned by a commercial firm may give loans on more favorable terms to the customers and suppliers of its parent. Risks to the financial system arise because a bank owned by a commercial firm may not have the freedom to exercise the discipline needed to make truly independent credit judgments.

While Wal-Mart proposes to use its ILC only for processing debit and credit card transactions, the Home Depot proposal has a significant and potentially more troubling twist. On May 9, 2006, Home Depot announced its agreement to purchase EnerBank to expand its “business and relationships” with home improvement contractors.¹ Home Depot stated that “[t]his acquisition gives us the opportunity to offer our services to The Home Depot’s large contractor customer base This growth opportunity and the resources of The Home Depot will also strengthen the high level of service we offer to our existing contractors and program sponsors.” When the contractor and the homeowner are negotiating a contract, the contractor will “tell the client to phone EnerBank” which will approve the loan. The EnerBank loan to the homeowner “starts” when the homeowner is satisfied that a contractor has completed the home improvement project and when the homeowner endorses an EnerBank check to the contractor.

Home Depot’s Notice states:

The Home Depot believes that EnerBank’s ability to help contractors be more successful will strengthen The Home Depot’s affinity relationship with its contractor customers, and as a result, they will be more likely to purchase their materials from The Home Depot.²

This Home Depot business plan creates an inherent conflict of interest because Home Depot will have an incentive to encourage EnerBank to provide financial services to home improvement contractors that are Home Depot customers and not to other contractors, because that will help increase sales by Home Depot. An unlevel competitive playing field is a significant risk because EnerBank may be pressured to provide loans on favorable terms to prospective borrowers who use contractors with whom Home Depot has established relationships as a means of generating additional business for Home Depot. As a wholly-owned subsidiary of Home Depot, on which it presumably will be dependent for a substantial portion of its funding, the EnerBank will have a built-in bias towards favoring applicants who do business with contractors who are customers of its parent. The Home Depot plan, therefore, has the potential to expose EnerBank to substantial risk of losses because of this inherent bias and conflict of interest.

An additional concern raised by the proposal arises in connection with the application of Section 23A of the Federal Reserve Act, 12 U.S.C. 371c, and Federal Reserve Regulation W, 12 fC.F.R. Part 223, which limit “transactions with affiliates.” EnerBank, of course, is subject to the restrictions of Section 23A and Regulation W.³ Loans made by EnerBank to customers of

¹ <http://ir.homedepot.com/ReleaseDetail.cfm?ReleaseID=195724>

² Interagency Notice of Change in Control filed by Home Depot on May 8, 2006, page 10.

³ 12 U.S.C. 1828(j).

Mr. John F. Carter
FDIC Regional Director, San Francisco
Page 3 of 5

home improvement contractors that are customers of Home Depot will be transactions that will be subject to Section 23A and Regulation W because the proceeds of the transaction are used for the benefit of, or transferred to, Home Depot. The Notice suggests that restrictions on transactions with affiliates are addressed by the proposed policy that prohibits contractors from purchasing material with an EnerBank check in Home Depot stores.⁴ The fact that Home Depot may benefit from, and perhaps receive the loan proceeds from, contractors indicates that Home Depot's business plan is based upon a miscomprehension of banking law. Accordingly, we believe that the business plan is flawed. We recommend that the FDIC consult with the Federal Reserve, the agency with rulemaking and interpretive authority for Section 23A⁵, regarding this matter.

Finally, I would like to restate my February request that Chairman Gruenberg add his voice to those who are concerned about other administrative actions that we believe weaken the national policy against mixing banking and commerce: (1) the Federal Reserve Board and the Department of the Treasury proposed rule that would permit financial holding companies and financial subsidiaries of national banks to engage in real estate management and brokerage, and (2) recent opinions of the Office of the Comptroller of the Currency (OCC) that, in our view, go beyond statutory authority banks have to own real estate to accommodate their businesses.

In light of concerns raised by NAR and others, we urge the Board to disapprove the proposed acquisition. If the Board does not disapprove the acquisition at this time, we request that the FDIC conduct a public hearing on the notice to provide interested parties an opportunity to make the case for disapproval in testimony before representatives of the FDIC, as it did for the Wal-Mart ILC application. Finally, because Congress is currently considering whether to tighten or eliminate the ILC loophole, and in light of the important public policy issues involved, we also urge the FDIC to inform Home Depot that it may not proceed with the acquisition to give the Board ample time to consider how to proceed.

Thank you for considering our requests.

Sincerely,



Thomas M. Stevens, CRB, CRS, GRI
2006 President, National Association of REALTORS®

Alabama Association of REALTORS®
Alaska Association of REALTORS® Inc
Arizona Association of REALTORS®
Arkansas REALTORS® Association
California Association of REALTORS® Inc
Colorado Association of REALTORS® Inc

⁴ Notice at page 10.

⁵ 12 U.S.C. 371c(f).

Mr. John F. Carter
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Page 4 of 5

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Mr. John F. Carter
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Page 5 of 5

cc: Members of the FDIC Board:

The Honorable Martin J. Gruenberg, Acting Chairman
The Honorable Thomas J. Curry
The Honorable John C. Dugan, Comptroller of the Currency
The Honorable John M. Reich, Director, Office of Thrift Supervision